BB

COPY

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ILLINOIS COMMERCE COMMISSION
2004 APR 13 P 3:09
TRANSPORTATION DIV

| | | |
|---|---|---|
| **Sullivan Township, Moultrie County, Illinois,** | ) | |
| **Petitioner,** | ) | |
| **vs.** | ) | **T03-0048** |
| **Union Pacific Railroad Company and the State of Illinois Department of Transportation,** | ) | |
| **Respondents.** | ) | |

**Petition seeking an order from the Illinois Commerce Commission authorizing permanent closure and removal of the TR 104 grade crossing (DOT #167 270M) and authorizing the signalization of the TR 117A grade crossing (DOT #167 269T) located in Sullivan Township, Moultrie County, Illinois on the trackage of Union Pacific Railway Company, together with construction of a connecting road, and allocating a portion of the cost to the Grade Crossing Protection Fund.**

---

## BRIEF ON EXCEPTIONS

NOW COMES Union Pacific Railroad Company, one of the Respondents herein, by and through one of its Attorneys, Dean W. Jackson, Esq., and pursuant to 83 Illinois Administrative Code, Chapter I, Section 200.830, hereby submits its Brief on Exceptions to Chief Administrative Law Judge's Proposed Order, and in support thereof states as follows:

**I. The Proposed Order, including Analysis, Conclusions and Findings contained therein, fails to discuss, analyze or take into consideration the *relative* benefits to the parties of the project as is required under the Illinois Commercial**

BB RK

DOCKETED
APR 14 2004

**Transportation Law (625 ILCS 5/18c-7302). In fact, the apportionment of costs as set forth in the order is clearly against the preponderance of the evidence submitted at the July 17, 2003, January 15, 2004 and January 30, 2004 Hearings. Further, the specific apportionment to Union Pacific Railroad Company (hereinafter "Railroad") of 50% of the cost of construction of a connecting road is error where the existence of that connecting road does not increase any perceived or actual benefit to the Railroad, but constitutes a benefit solely to the Public, including Sullivan Township, Moultrie County, the City of Sullivan, and the State of Illinois.**

1. The Illinois Commercial Transportation Law provides, in relevant part, as follows:

> The Commission shall also have the power, after a hearing, to require major alteration of or to abolish any crossing...when in its opinion, the public safety requires such alteration or abolition...and to prescribe, after a hearing of the parties,...the proportion in which the expense of the alteration or abolition of such crossings..., **having regard to the benefits, if any, accruing to the rail carrier or any party in interest, shall be divided between the rail carrier or carriers affected, or between such carrier or carriers and the State, county, municipality or other public authority in interest.**
> ...
>
> The Commission shall also have power by its order to require the reconstruction, minor alteration, minor relocation or improvement of any crossing (including the necessary highway approaches thereto) of any railroad across any highway or public road...whenever the Commission finds after a hearing...that such reconstruction, alteration, relocation or improvement is necessary to preserve or promote the safety or convenience of the public, or of the employees or passengers of such rail carrier or carriers. By its original order..., the Commission may direct such reconstruction, alteration, relocation, or improvement to be made in such manner and upon such terms and conditions which may be reasonable and necessary and may apportion the cost of such reconstruction, alteration, relocation or improvement and the subsequent maintenance thereof, **having regard to the benefits, if any, accruing to the railroad or any party in interest, between the rail carrier or carriers and public utilities affected, or between such carrier or carriers and public utilities and the State, county, municipality or other public authority in interest.** (625 ILCS 5/18c-7401.) (Emphasis added.)

2. The project envisioned in the instant case, the signalization and improvement of one crossing, the abolition of another, and the construction of a connecting road for the traveling public, is clearly a major alteration under the Illinois Commercial Transportation Law cited above. Regardless whether one considers this project a "major" or "minor" alteration, however, this Honorable Commission must undertake a "relative benefits to the parties and all others in interest" analysis prior to coming to a decision apportioning costs of the project to the parties. The Proposed Order in this case fails to reasonably apportion costs to the parties in interest based upon benefits to the parties. The apportionment of only $13,482 cost to Sullivan Township, Moultrie County, the main beneficiary of this project, (a mere 1.9 % of the project cost as a whole) is against the preponderance of the evidence. The apportionment of $275,325, or 38% of the project cost, to this Railroad is not supported by the evidence. In short, the apportionment set forth in the Proposed Order here is unsupported by the evidence, and is arbitrary and capricious.

3. The record in the instant case is rife with evidence of benefits to the Sullivan Township, Moultrie County, the Illinois Department of Transportation, the State of Illinois, and the general public traveling the highways and roadways of the State of Illinois. The record is virtually silent on the issue of concrete factual evidence of benefits of the project to this Respondent Railroad.

4. The evidence adduced at Hearings held herein of benefits to the Township, County, State and highway traveling public includes, at a minimum, the following:

a. The project will benefit all of the agricultural traffic, the AgriFab business nearby, school buses and residents of a large subdivision in the area. (Witness Elmo

Weaver, Sullivan Township Road District Highway Commissioner; July 17, 2003 Tr. p. 9.)

b. The project will benefit residents of a new subdivision being built nearby, the public traveling to Lake Shelbyville from the City of Sullivan, Illinois, and emergency vehicles. (July 17, 2003 Tr. p. 10.)

c. Moultrie County, obviously receiving benefit from the new roadway configuration, intends to construct the new connecting road between Township Road 117A and Township Road 104. (July 17, 2003 Tr. pp. 13, 15.)

d. Average daily traffic (ADT) on Township Road 104 (proposed to be closed) is only 175 per day, while ADT at TR 114A is 750. Closing TR 104 and building the connecting road will obviate the need for vehicles of any kind heading south out of Sullivan, Illinois from having to cross the railroad tracks at all, resulting in a benefit to the County for school bus and emergency vehicle traffic. (Witness Douglas Delong, Moultrie County Highway Engineer; July 17, 2003 Tr. pp. 21, 22.) This includes a Lake Rescue Dive Team, police and fire department service. (July 17, 2003 Tr. p. 22.)

e. The project will benefit farm trucks using the roads. (July 17, 2003 Tr. p. 23.)

f. Four to eight school buses using the crossing each day will no longer have to do so. (July 17, 2003 Tr. p. 25.)

g. Boater traffic heading to two lake access ramps will benefit, as will a Hotel and a Bed and Breakfast in Sullivan, Illinois. (July 17, 2003 Tr. p. 26.)

h. A nearby campground and Timberlake Golf Course will benefit from the project, as will grain traffic, anhydrous ammonia transport traffic, propane trucks and the Van Horn business. (July 17, 2003 Tr. p. 27.)

i. Nearby England's Gasoline and Oil business, and the farmers they service, will benefit from the project. (July 17, 2003 Tr. p. 31.)

j. Completion of the project will allow the public and emergency services to travel anywhere south or west of Sullivan, Moultrie County, Illinois without having to use the crossings. (July 17, 2003 Tr. p. 32.)

k. The cost of the connecting road, only one-eighth of a mile long and designed as aggregate base with bituminous surface (not asphalt) for only an ADT of 350, with highway approaches, is $424,620. (Order of September 4, 2003, p. 4; Witness Michael Cummins, Cummins Engineering, July 17, 2003 Tr. pp. 38-39, 43.) *The connecting road will not even cross any of the tracks of Respondent Railroad.* (July 17, 2003 Tr. pp. 38-39, 43, 46, 52-54, 58.) (Emphasis added.)

5. The evidence in the record of benefits to the Respondent Railroad in authorizing and completing this project is minimal, at best. While there is evidence from the July 2003 Hearing that there have been accidents with fatalities at road crossings of the 33 degree skewed type in the County (Witness Weaver, July 17, 2003 Tr. p.12; Witness Delong, July 17, 2003 Tr. p. 19.) Neither witness Weaver nor witness Delong testified that the fatal accidents occurred on either of the two crossing at issue here. *In fact, not one of the fatal accidents identified by the witnesses occurred at either Township Road 104 or Township Road 114A.* (Emphasis added.)

6. Respondent's Exhibit A in the record is the verified Affidavit of David W. McKernan, Respondent's Regional Manager Industry and Public Projects, with Department of Transportation, Federal Railroad Administration accident history records. This evidence shows that there have been no accidents of any kind during the past 20 years at either of the crossings at issue here, and that the only two accidents occurring at these crossings were non-fatal accidents in 1979 and 1981. This evidence was not presented until the January 15, 2004 Hearing as: (1) Respondent had no objections to the Petitioner's request that the Respondent be apportioned 5% of the new signalization costs, the cost for replacement of new timber crossing ties, and the crossing closure cost, with the remainder of the project costs to be apportioned to the Grade Crossing Protection Fund and other parties in interest; (2) Respondent did not know that accident history was an issue in the case; (3) Respondent had expected a Proposed Order from the Administrative Law Judge prior to issuance of a Final Order by the Commission; (4) Respondent expected that this honorable Commission would perform the benefits analysis required by Illinois Law and apportion it 5% of the appropriate project costs in

the Proposed Order as has occurred in all such cases in the past; (5) Respondent did not know that the Grade Crossing Protection Fund was unavailable for use on the majority of this project as it had been for all other similar projects in the past or that a new "rule" was in effect in connecting road cases (see below); and (6) Respondent did not know that it would be apportioned project costs beyond that requested in the Petition, namely for 38% of the project costs as a whole including the costs of the connecting road. (Witness David McKernan, Railroad Manager of Industry and Public Projects, January 15, 2004 Tr. pp. 29-31.)

7. The only other "benefits" in the record to the Respondent at the July 2003 Hearing was vague testimony that occasionally trains blocked one or the other of the two crossings involved here, and that closure of one crossing would be beneficial to Respondent. However, there was no testimony as to which crossing was blocked, how often or for how long. (July 17, 2003 Tr. pp. 11, 30.) The testimony of blocking crossings was so vague and lacking as credible evidence as to be of no use in any benefit analysis. Furthermore, there was no evidence as to benefit to Respondent from closure of a crossing with an ADT of only 175, such as savings in liability insurance or exposure, maintenance, upkeep, etc. As previously noted, there have been no accidents at either of these crossings in over 20 years, and any testimony as to accidents at other "similar" crossings is irrelevant, even absent consideration of Exhibit A.

8. Quite to the contrary, there was a plethora of evidence adduced from Mr. McKernan at the January 15, 2004 Hearing of the *absence or lack of benefits to the Railroad* in proceeding with the subject project.

a. Neither the Township Road 117a crossing (known as Eton Street) nor the Township Road 104 crossing had any recent crossing incidents or accidents. Research of

the Federal Railroad Administration database showed only one incident at each crossing back in 1979 and 1981, and neither incident involved any fatalities. (January 15, 2004 Tr. pp. 10-11.)

b. While occasional blocking of the crossings may have occurred in the past, the Railroad had not received any crossing blockage violations from the County or the Illinois Commerce Commission for blocking crossings at either crossing. (January 15, 2004 Tr. pp. 11-13.)

c. The Railroad has not contributed to the cost of connecting road construction in other cases, with one exception, and in all of these other cases the construction costs associated with the connecting roads was apportioned 100% to the Grade Crossing Protection Fund. (January 15, 2004 Tr. pp. 14-25, 50-51.) The only exception involved a unique situation wherein payment was made in negotiation among parties in consideration for dismissal of a case. (January 15, 2004 Tr. pp. 13, 37.) In the instant case, prior to the filing of the Petition during negotiations between the Railroad and Sullivan Township, the Railroad had agreed to compensate Sullivan Township only the amount of $17,500 in return for closure of the Township Road 104, no more, no less, and certainly no additional payment for construction of the connecting road. (January 15, 2004 Tr. pp. 27, 29-30.) Commerce Commission Staff at the time had no objection to this agreement, and all parties expected that the Grade Crossing Protection Fund would contribute 100% of the cost of construction of the connecting road given its policies and rules in effect at the time and given the benefits to the public brought about by the project. (January 15, 2004 Tr. p. 30.) In addition to the $17,500 payment to the Township, the Railroad agreed to contribute approximately $7,000 to close, barricade and remove the Township Road 104 crossing, plus 5% share of signalization cost at Township Road 117A. (January 15, 2004 Tr. pp. 31, 34.)

d. *The only credible benefit analysis evidence of the annual dollar cost savings to the Railroad of the closure of Township Road 104 was $1,500 in maintenance cost for a single mainline 24 foot timber crossing protected by crossbuck.* (January 15, 2004 Tr. pp. 32-33.) (Emphasis added.)

e. There is discussion in the record of the "alleged" danger presented by "skewed crossings", but no concrete evidence that such crossings are, as a general rule, in actuality more dangerous. Furthermore, there is ample testimony cited above that *these crossings involved in the proposed project were* ***not dangerous*** *given the absence of an accident history at either crossing.* (See paragraphs 5, 6, 8a above.) (Emphasis added.) Mr. McKernan denied that they were inherently dangerous. (January 15, 2004 Tr. p. 45.) *Mr. Bob Berry, Illinois Commerce Commission Staff Railroad Safety Specialist refused to testify that a skewed crossing is more dangerous than a ninety degree or other railroad crossing.* (January 15, 2004 Tr. pp. 67-69.) Mr. Berry could offer only speculative, "possibility", "if" testimony on the issue of "dangerousness" of skewed crossings. (January 15, 2004 Tr. p.69-70.) With all due respect, Mr. Berry offered no credible, factual evidence of any kind that the crossings involved here were dangerous, and therefore there is no factual credible evidence in this record of additional benefit to the

Railroad from closure of one of them. Again, the accident history of record depreciates any finding of additional benefit to the Railroad from closure of a crossing.

d. There was some suggestion from Counsel for Petitioner that a reduction in liability insurance rates or less exposure to lawsuits where a crossing was closed might or could constitute a benefit to the Railroad. (January 15, 2004 Tr. p. 47.) However, the testimony was that such was entirely speculative and could not be quantified, resulting in absolutely no credible factual evidence on this record of that benefit to the Railroad from a closure of one of the particular, virtually accident-free crossing at issue on this Petition. (January 15, 2004 Tr. pp. 48-49.) The speculative nature of this liability/lawsuit evidence was conceded by the Chief Administrative Law Judge. (January 15, 2004 Tr. p. 88.)

9. Simply put, there has been no meaningful consideration of benefits analysis, weighing of relative benefits to the Parties or apportionment of costs pursuant to the benefits, if any, accruing to the parties in interest in this case. The Railroad respectfully submits that the Conclusions listing the alleged benefits to the Railroad in the closure of Township Road 104 are just that: conclusions unsupported by facts in evidence. Savings in "financial liability" cited at page 7 of the Proposed Order has no basis in fact in the record. A statutory "relative benefits analysis" would require more than that; it would require a financial savings analysis, either from a monetary insurance savings standpoint or some other financial analysis; it would require accident history evidence detrimental to the Railroad, including numerous crossing accident claims/lawsuit history or settlements/verdicts rendered involving the particular crossings at issue. There has been no liability element attached to the crossings at issue here, nor to railroad crossings in general, which can serve as the basis for a benefit to the Railroad in this matter. Any conclusion on the record in this case of benefit to the Railroad based upon the speculative nature of "in case of a vehicle/train collision" at crossings which have been accident-free for 20 or more years does not meet the "relative benefits analysis" standard set forth in the Illinois Commercial Transportation Law.

10. Furthermore, the apportionment of costs set forth in this Honorable Commission's Proposed Order is against the preponderance of the evidence, and is arbitrary and capricious. Clearly, this project greatly benefits Sullivan Township, Moultrie County, State of Illinois residents in and around Sullivan and Lake Shelbyville in the state of Illinois, business entities and the motoring public in general. The benefits to the Railroad adduced in evidence at the Hearing are vastly outweighed by the benefits to others in interest in this case. Interestingly enough, while the Illinois Department of Transportation (hereinafter "IDOT") is a named Respondent herein, IDOT is not participating in the project on a financial basis and nobody knows why this is so. (July 17, 2003 Tr. p. 60.) Nor was IDOT apportioned any percentage of costs of the project in this Commission's Order of September 4, 2003 or in the Proposed Order. Respondent respectfully suggests that this further supports Respondent's argument that the apportionment is flawed on a benefits analysis basis, as well as contrary to the preponderance of the evidence.

**The fact that other cases discussed in the Testimony may have been the subject of Stipulated Agreements is a distinction insufficient to justify the apportionment of connecting road construction costs to Respondent Railroad.**

11. As discussed above in Mr. McKernan's testimony, there was evidence of four other cases involving construction of connecting roads, the costs of which were borne 100% by the Grade Crossing Protection Fund. (See par. 8c above.) The Proposed Order seems to suggest that since the instant case is a "contested case" (83 Ill. Admin. Code Section 200.40; Ill. Admin. Proc. Act 5/ILCS 100/5-10(c)), then the Grade Crossing Protection Fund is not required to bear 100% apportionment of the costs of constructing

connecting roads. With all due respect, the use of "Stipulated Agreements" is a distinction without substance or meaning. The use of a Stipulated Agreement simply means that the *parties* performed the "relative benefits" analysis, and that in confirming the Stipulated Agreement by Commission Order, the Commission agreed that allocation of 100% of costs to construct the connecting roads to the Fund was proper given the benefits to the municipalities, Public Bodies and to the Public. The fact that a Stipulated Agreement process, rather than a contested case process, was used does not absolve the Commission from performing the relative benefits analysis. The Railroad respectfully submits that that analysis here should result in assessing 100% of connecting road costs to the Fund.

**The Commission is not free to ignore prior precedents or to deal with matters unfettered by Rule or to avoid legal duties as they arise from case to case although the matters in the cases are similar or the same, all as suggested by the Supreme Court in *Mississippi River Fuel Corp. v. Illinois Commerce Commission* (1953), 1 Ill.2d 509, 116 N.E.2d 394.**

12. Respondent Railroad is not submitting that it and all Parties to this proceeding are bound by all precedent. Rather, Respondent is arguing (1) that the applicable law does require that any cost allocation be based on the relative benefits to the Parties, thereby making other connecting road cases relevant to the inquiry, and (2) that the Commission has "created a new rule" in this connecting road cost allocation case without following the requirements of the law. (*See* Section III. below.)

13. The *Mississippi River Fuel Corp.* case is simply inapposite to the issues facing this Honorable Commission here. First, the ruling in the case was handed down in 1953.

The Court was not constrained by the Illinois Commercial Transportation Law which was not even enacted until some 33 years later by Public Act 84-796, effective January 1, 1986. (625 ILCS 5/18c-7101 *et seq.*) Nor was the Court burdened with the Illinois Administrative Procedure Act enacted 22 years after the *Mississippi River Fuel Corp.* case under Public Act 79-1083, effective September 22, 1975. (5 ILCS 100/1-1 *et seq.*) The issue before the Court in 1953 was whether the Company there was a Public Utility under the Public Utilities Act (Ill. Rev. Stat. 1953, Ch 111 1/2, Section 10). At best, the Court's statements that the Commission had the power to deal freely with any situation regardless of any prior proceedings was *dicta* and irrelevant to the ultimate decision rendered there. Interestingly enough, the Supreme Court in *Mississippi River Fuel Corp.* ruled **against** the Commerce Commission's position that the Company was subject to Commission jurisdiction and regulation, thus rejecting the Commission's own argument that it had the power to decide what it wanted regardless of its prior positions. In any event, that 1953 decision does not abrogate nor purport to relieve the Commerce Commission from its legal duties to follow both the Administrative Procedure Act and the Commercial Transportation Law, which this Respondent submits it has failed to do in the Proposed Order..

**The financial condition of the Illinois Grade Crossing Protection Fund is absolutely *not* a factor that can have any weight in the relative benefits analysis, nor, even if one considered the condition of the Fund an appropriate factor, does it increase any possible benefit to Respondent Railroad in this case sufficient to justify apportioning costs of constructing a connecting road to the Railroad.**

14. A great deal of discussion which occurred at the various Hearings held in this matter centered around the fact that the Fund simply has insufficient monies in it to continue funding costs to construct connecting roads. Just a portion of the discussion is as follows:

Q. (Railroad Counsel Mr. Farwell) Mr. Berry, basically it sounds to me as though what you're saying is because of the financial condition of the fund, the Commission will no longer fund 100 percent of connecting roads which was something that they did in most prior cases, all except three.

A. (Mr. Berry, ICC Staff) That is my understanding, yes.

(January 15, 2004 Tr. p. 75.)

***

Q. Does the amount of money the fund has in it have anything to do with the benefit the railroad receives from a closure? ...

Q. Is there any relationship between those two things?

A. I don't think so.

Q. Is there any difference in the benefit the railroad received or would have received from the closure at Township 104 closure from the benefit it received at the Township 137 closure?

A. No, because at the time those were done the fund was paying 100 percent of the costs of the connecting roads.

Q. Was there any difference in the benefit the railroad received from the closure in those two cases?

A. No.

Q. Was there any benefit that the railroad will receive between the Township 104 closure and the closure at Black Dog Road [where the fund paid 100% of the cost of construction of the connecting road].

A. Other than getting a crossing closed.

Q. That's the benefit, isn't it?

A. Yes.

(January 15, 2004 Tr. pp. 76-77.)

Other portions of the Transcripts from the January Hearings are replete with discussions between Railroad Counsel, Staff and the Administrative Law Judge as to the poor financial state of the Grade Crossing Protection Fund. (See, *e.g.*: January 15, 2004

Tr. p. 74: "...budget constraints of the State of Illinois"; January 30, 2004 Tr. p 111: "...there are no additional funds at least at this time to be available that we could use for the Grade Crossing Protection Fund to help fund or take more on, take more than 50 percent of the connecting road costs on." ... "That's correct."; January 30, 2004 Tr. p. 112: "They just don't have the money."; *See further:* January 30, 2004 Tr. at pp. 112-117.)

15. Clearly, the financial condition of the Grade Crossing Protection Fund was a factor considered by this Staff and this Commission in it's Proposed decision to apportion 50% of the cost to construct the connecting road portion of this project and, as such, was error. (*See also* Section III following.) As so aptly put by Counsel in Closing Statements:

> "...[B]ut the problem [here] is there is no difference in benefit to the railroad between a crossing that's closed with a connecting road and a crossing that's closed without a connecting road. It's all just a closed crossing." (Mr. Farwell, January 15, 2004 Tr. p. 80.)

Clearly, while the crossing closure may be of some unquantified ( by testimony) benefit to the Railroad, the connecting road is a public benefit to the other parties in this case, and to the people of the State of Illinois. It does not benefit the Respondent Railroad, even in the eyes and testimony of Commission Staff. And the financial condition of the Fund should have no weight or bearing on the apportionment in benefit, and hence costs, to the Parties.

**II. There is no evidence in the record to justify the added expense to install a concrete crossing surface at Township Road 117A crossing.**

16. The Proposed Order, at Finding #3 on page 8, provides for the installation of a concrete crossing surface at the Township 117A crossing, with an estimated cost of $60,000. The record is devoid of any testimony to support such an upgraded crossing. In

fact, given the construction of the connecting road as being of a bituminous surface (not asphalt), and the low projected ADT at the crossing (July 17, 2003 Tr.; *see*: Section I(4)(k) above), the evidence justifies construction of only a timber crossing at that location.

**III. The Commission's "new" policy or procedure in apportioning a high percentage of project costs for construction of connecting highways/roadways to rail carriers is invalid.**

17. In this case, the Commission has created and invoked a new policy/rule of assessing rail carriers with a high percentage of construction costs associated with construction of connecting roads where a rail crossing closure is contained in the Order. Here the Order apportions to Respondent 50% (fifty percent) of the cost of constructing the 1/8$^{th}$ mile aggregate road between TR 114A and TR 104, some distance removed from Respondent Railroad's tracks, in the amount of $213,120, **in addition to** 10% (ten percent) of the cost of installation of AFLS and gates, **in addition to** costs of installation of crossing surface, and **in addition to** 100% (one hundred percent) of the costs of closure of TR 104. A similar policy has been proposed and used in other such cases as this. This action by the Commission is invalid.

18. The Illinois Administrative Procedure Act defines a "rule" as follows:

> "Rule" means each agency statement of general applicability that implements, applies, interprets, or prescribes law or policy, but does not include (i) statements concerning only the internal management of an agency and not affecting private rights or procedures available to persons or entities outside the agency, (ii) informal advisory rulings issued under section 5-150, (iii) intra-agency memoranda, (iv) the prescription of standardized forms, or (v) documents prepared or filed or actions taken by the Legislative Reference Bureau under Section 5.04 of the Legislative

Reference Bureau Act. (5 ILCS 100/1-70.)

19. The Commission's new policy of apportioning rail carriers a certain percentage of the costs of construction of a connecting road away from a carrier's rail where another crossing, albeit one with low ADT, is closed, is a "rule" within the meaning of the Illinois Administrative Procedure Act.

20. The Illinois Administrative Procedure Act further provides:

> (c) No agency rule is valid or effective against any person or party, nor may it be invoked by the agency for any purpose, until it has been made available for public inspection and filed with the Secretary of State as required by this Act. (5 ILCS 100/5-10(c).)

21. The Commission's policy has not been formally proposed, published, adopted and filed with the Office of the Secretary of State pursuant to the Illinois Administrative Procedure Act.

22. Accordingly, the Commission's policy may not be lawfully invoked in this case against this Respondent, and its Order apportioning Respondent 50% of the costs of construction of the connecting road under the circumstances is invalid. *Senn Park Nursing Center v. Miller*, 104 Ill 2d 169, 470 N.E.2d 1029, 83 Ill. Dec. 609 (1984).

23. Where rules, policies or procedures are not adopted consistently with statutory procedures, they are not valid. (*Sleeth v. Illinois Department of Public Aid*, 125 Ill.App.3d 847, 466 N.E.2d 703, 81 Ill.Dec. 117 (3rd Dist 1984).) Moreover, where a party obtains invalidation of an administrative rule, that party is then entitled to petition for reimbursement of litigation expenses and legal fees. Illinois Administrative Procedure Act, 5 ILCS 100/10-55(c); *Citizens Organizing Project v. Department of Natural Resources*, 189 Ill.2d 593, 727 N.E.2d 195, 244 Ill.Dec. 896.

24. That the Commission has, in fact, created a "new rule" with respect to apportionment of costs to rail carriers to construct connecting roads is clear from the record herein. At the January 15, 2004 Hearing, the Honorable Chief Administrative Law Judge queried Staff as to it's recommendation whether the original September 4, 2003 Order assessing 50% of the cost of the connecting road to the Railroad should stand. Staff responded as follows:

A. (Mr. Berry) I think the original order should stand.
Q. (Judge) Is there a reason why?
A. I was told prior to the hearing, the previous hearing in this matter, that due to our funding problems that the Grade Crossing Protection Fund would only be paying 50% of connecting roads ***from this point forward.***
Q. Okay. That was communicated to you by whom?
A. By Mike Stead who is the railroad—head of the Railroad Section.
Q. Program Safety Manager?
A. Yes.
Q. And when did he let you know about that?
A. ***The morning of the hearing.***
Q. So now it's going to be Staff's position that all connecting roads will not be funded 100%?
A. As I understand it, yes.

(January 15, 2004 Tr. p71-72.) (Emphasis added.)

***

Q. (Judge) Thank you. So, again, your recommendation then is that the order that was originally entered by the Commission...remain in force?
A. Yes.
Q. Or that it be affirmed?
A. It be affirmed. You know, we're not picking on the Union Pacific. ***It's for all railroads.***
Q. ...You're simply saying that the circumstances have changed due to the budget constraints of the State of Illinois.
A. Yes.

***

Q. (Railroad Counsel Farwell) ***Now this is as far as you're aware of a change in the Commission's practice of the past.***
A. (Mr. Berry) ***Yes.***

(January 15, 2004 Tr. pp. 74-75.) ( Emphasis added.)

25. As is clearly evident by the above testimony, the Illinois Commerce Commission has adopted a new Rule requiring all Railroads to contribute 50% of the cost of the construction of a connecting road in any case, in all cases, and irrespective of the relative benefit analysis which the Commission is required to perform ***by law*** in each particular case. That this is not simply a "change in a minor ministerial policy" is equally clear. This is further evidenced by Staff's position taken at the final January 30, 2004 Hearing:

> Judge Korte: Mr. Berry, we're going to give you the floor. ...
> Mr. Berry: We tried to think of other means of trying to find money, and, quite frankly, it was the opinion [of the Railroad Safety Program Administrator and the Program Director of the Commission] that we've gone to a 50/50 split between the fund ...and the railroad for the construction of connecting roads. Now that's not just against the UP. That's all railroads, and it's a program ***that's been in place now for several months...***

(January 30, 2004 Tr. p. 111.) (Emphasis added.)

26. As evidenced by all of the above, this assessment against railroads is not simply a shift in ministerial policy, it is a significant, far-reaching Rule/Policy/Procedure change, and an incredibly substantial one at that. It required the Commission to comply with the Illinois Administrative Act. Its failure to do so invalidates the rule and requires that the Proposed Order be changed in total in this case pursuant to all of the above facts and argument.

WHEREFORE, for all of the foregoing reasons, Respondent, Union Pacific Railroad Company, respectfully requests that the Proposed Order be altered, amended and changed in total to reflect the above Proposed Findings and Conclusions.

Mr. Steven K. Wood, Esq.
Attorney at Law
200 West Harrison Street
Sullivan, Illinois 61951

Dean W. Jackson

**PURSUANT TO 83 Ill. Admin Code Section 200.850, REPONDENT RESPECTFULLY REQUESTS THAT ORAL ARGUMENT BE GRANTED FOR REASON THAT THE INSTANT CASE INVOLVES NOVEL AND UNIQUE ISSUES OF FACT AND LAW.**

Respectfully submitted,
Union Pacific Railroad Company,
By Dean W. Jackson, its' attorney.

By: _____

Dean W. Jackson, Esq.
938 South Fourth Street
Springfield, Illinois 62703
(217) 523-4823
(217) 523-4834 (Fax)

**PROOF OF SERVICE**

The undersigned hereby certifies that he caused a copy of the foregoing Application for Rehearing to be served on the following, by placing same in a preaddressed postage prepaid envelope and depositing same in the US Mail in Springfield, Illinois, this 13th day of April, 2004:

Honorable Rick Korte
Chief Administrative Law Judge
Illinois Commerce Commission
527 East Capitol Avenue
Springfield, Illinois 62701

Mr. Robert S. Berry
Illinois Commerce Commission Staff
527 East Capitol Avenue
Springfield, Illinois 62701

Ms. Stacey C. Hollo
Legal Counsel
Illinois Department of Transportation
2300 S. Dirksen Parkway
Springfield, Illinois 62764